actor is entirely relevant.[27] As shown *supra.*, defendants' intent was to comply with the agency's rules, albeit using what was believed to be a common loophole. However, in any event the claim of abuse is unsupportable in view of the relevant law and procedure which fully demonstrates that had defendants obtained competent counsel for the purpose of preparing their applications to the Commission, defendants would have been (and are) fully eligible to apply for and hold the licenses in question.[28]

191. As evidence of that eligibility, defendants first point out the grant of the license for WIL990 in Dallas, Texas. That license authorized Ronald Brasher to operate upon five T-band channels, which license was granted on May 28, 1996, immediately preceding the preparation of the applications for Allen, Texas. Yet, the testimony given at trial reveals that some interpretation of the Commission's rules, which interpretation has not been offered by the Bureau or any of the witnesses, precluded the defendants from immediately duplicating that licensing method in Allen. The only explanation provided at trial relates to 47 C.F.R. §90.313 and the supposed obligations on applicants arising out of an unpublished interpretation of that rule that was made effective by the internal policies of PCIA. Further testimony demonstrated that both John Black and PCIA's representative,

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[27] A conclusion that an entity abused the Commission's processes requires a "specific finding, supported by the record, of abusive intent". *Evansville Skywave, Inc.*, 7 FCC Rcd. 1699, 1702 n. 10 (1992); *see, also, Eunice Wilder*, 4 FCC Rcd. 5310, para. 251 (1989) with regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process.

[28] No abuse of process was found where it was also found that the Bureau presented no evidence or other showing that the licensee was ineligible to hold the license in question. *In the Matter of James A. Kay, Jr.*, WT Docket No. 94-147, FCC 99D-04, 10 FCC Rcd. 2061, para. 205 (released Sept. 10, 1999) (hereinafter, "*James A. Kay, Jr.*").

Scott Fennell, assisted in trying to explain that interpretation to Ron Brasher and the possible method for complying with that rule section via the use of managed facilities.

192. To assess what results the combined efforts of the Brashers, Black and Fennell, were attempting to achieve, one looks first to the subject rule. The rule reads in pertinent part:

> §90.313 Frequency loading criteria
>
> (a) Except as provided for in paragraph (b) of this section, the maximum channel loading on frequencies in the 470-512 MHz band is as follows:
>
> (2) 90 units for systems eligible in the Industrial/Business Pool (see §90.35(a))
>
> (c) ...A licensee will be required to show that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel.

193. Taken together, the subsections of Section 90.313 require that a licensee show that a channel is fully loaded prior to requesting additional channels. Testimony at trial is clear that the concrete companies which would use the Allen, Texas channels immediately placed up to 700 mobile units on the Allen, Texas system. Stated another way, the demand, *i.e.* hold orders, for use of the Allen, Texas system justified the immediate grant of eight channels or, if one will, the grant of the channels licensed to Norma, Jim, Melissa, Jennifer, O.C., Ron, Carolyn, and David. With further loading of an additional handful of mobile units, a ninth channel would be justified under the rules.

194. What this demonstrates is that defendants never needed to seek the assistance of third parties. Instead, defendants were fully eligible to apply for and receive a license to operate

on each of the channels in their own names, or in Metroplex's name, in the first instance. All defendants needed to do was to include with the application evidence of the hold orders of the concrete companies to demonstrate loading and defendants' application for eight channels would have been fully eligible for grant. The, albeit somewhat absurd, alternative would have been to file an initial application for one channel, followed by seven successive applications for modification to add each additional channel, each application being immediately granted to reflect the loading that existed prior to the time when the first application was filed. If construction was an issue (and there is no evidence that it was) defendants could have constructed all eight channels, providing power to each one on successive days (or hours) that each application to modify was granted by the Commission. In either event, defendants would have been fully eligible to apply for and be granted, under a single call sign, at least eight channels and, by now, more.

195. The case law clearly demonstrates that abuse of the Commission's processes will not hold when the actions taken by party do not violate the intent of the Commission's rules and which result in the grant of a benefit for which the entity would have otherwise been fully eligible.[29] The clear intent of the subject rule is to prevent spectrum warehousing and to assure that the T-band channels are constructed, made operational, and are fully used to provide communications service to the public. The testimony and associated evidence is entirely clear that the subject channels were acquired to serve the public, were used to serve the public, and have been employed at loading levels which are fully consistent with the criteria set forth in Section 90.313. The Bureau does not allege that defendants

[29] *Id.*

eligibility and suitability.[32] However, even this general consideration is fraught with legal and factual problems when one introduces the issue of managed facilities and the issue of when does a management agreement imbue the manager with such indicia of ownership that the manager may be found to be the real party in interest. To separate this issue from the issue of "control" the matter must necessarily focus more on the issue of ownership of the license. Accordingly, the question becomes who owned those property rights, however defined, in the subject applications and licenses.

197. Taken in the objective, each of the Sumpters was fully qualified to hold an FCC license. All were of majority. All were citizens. None were found to have committed any felony or other disqualifying act. So, taken in the objective, each of the Sumpters were fully qualified to hold a Commission license and the Commission was provided an opportunity to pass on the qualifications of each when the T-band applications were submitted.

198. Similarly, each of the defendants were qualified to hold a Commission license and each had been found qualified in the processing of grants of applications in each of the defendants' names. Therefore, again the Commission was provided an opportunity to review and pass on the eligibility and suitability of each of the defendants and did not find any of the defendants ineligible.

199. Based solely on providing the Commission the opportunity to review and pass on the eligibility of each licensee, the evidence demonstrates that the agency was provided that

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[32] *Arnold L. Chase*, 5 FCC Rcd. 1642, 1643 (1990) "[i]t is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party."; *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12060 (ALJ 1999).

opportunity. So, in the objective, the intent of the real party in interest rules and policies has been served by defendants.

200. One may then examine the intent of the parties in obtaining the licenses. Those licenses obtained by parties to operate on the defendants' 900 MHz system are not relevant to this issue, since each such subject license was an "end user" license and the testimony shows that each such license was intended to authorize the use of radios in the individual licensees' vehicles. Ergo, the customer/licensee was, in fact, the real party in interest to those facilities installed within their own (or their respective families') vehicles. That the record demonstrates that defendants obtained no economic or competitive benefit from the issuance of these licenses further supports the conclusion that no real party in interest issue might attach to the grant of those licenses.

201. The defendants' intent in obtaining the T-band licenses in Allen, Texas is fully known. The evidence also shows that defendants were unaware of any legal bar to their obtaining licenses in the manner chosen. Therefore, if one focuses solely on the intent of defendants as a sidebar to the earlier treated issue regarding whether an abuse of process occurred, in support of a violation of the real party in interest rules, again the allegation is without support.

202. If one focuses on the issue in view of the implications that defendants engaged in either a misrepresentation or lacked candor by filing in the names of family members, then one necessarily backs into the issue of intent. Defendants did not attempt to deceive the Commission or hide their involvement in the facilities. The control point information listing Metroplex's address and telephone number on each application and license belies

that claim. Therefore, there is no credible evidence that defendants were doing anything other than taking advantage of what they were led to believe was an acceptable loophole. Accordingly, the blurring of misrepresentation, lack of candor and real party in interest concepts will not produce a foundation for finding that defendants acted inappropriately. Further, the licensing method was fully consistent with tax advice given by Jim Sumpter to segregate such assets into the names of individuals.

203. The issue of real party in interest, therefore, becomes one of who the intended owner of the licenses was to be and who ultimately controlled the fate of that property.[33] The facts present a clear picture that defendants believed that the licensees maintained that control.

204. The most illuminating evidence as to the defendants' states of mind is as follows. The testimony at trial demonstrates that defendants were concerned about whether Carolyn Lutz should hold a license because she might cause the channel to be no longer available for serving Metroplex's customers. Additionally, the testimony demonstrates that upon request by Norma Sumpter, defendants shut down the T-band channels licensed to Norma and Melissa Sumpter. This action occurred prior to the filing of the Net Wave petition. The facts also make it clear that Norma was in absolute control of the 900 MHz licenses that they were applied for and granted in her name. For instance, Norma filed for cancellation of the first 900 MHz license granted to her. With regard to the second 900

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[33] *Id.* at 1648 n. 5 The phrase real party in interest is used in connection with pending applications, while de facto control is used in connection with a licensed station. In either case, the pertinent concern is whether someone other than the named applicant or licensee is in control; *High Sierra* at 427; *see, also, In re Applications of Brian L.. O'Neill,* 6 FCC Rcd 2572, para. 24 (1991) (hereinafter, "*Brian L. O'Neill*") "[a] real party in interest inquiry is relevant only to an undisclosed interest in an application, not a license."

Designation Order, the Bureau refers to an old case, *Intermountain*,[36] in which the decision set forth indicia of control of a common carrier station. The six elements cited in *Intermountain* are instructive in nature and not intended to create a six-prong test. Rather, the elements are those to which that court looked to determine whether control of a license had passed.

206. Defendants do not claim that they consulted *Intermountain* prior to engaging in their dealings with the Sumpters or Ms. Lutz. In fact, the record evidence shows that defendants were ignorant of many areas of the law related to third party licensees. Instead, defendants employed a different kind of test for selecting third parties that might serve as licensees of the Allen, Texas channels to be employed as a part of Metroplex's system. Testimony shows that the first test was whether the person was a member of the family. The reason for this criterion is obvious. Ron and Pat Brasher cared deeply about family and chose to extend the benefits of their radio systems to family.

207. Additionally, those family members who participated in the licensing of the Allen facilities had knowledge of Metroplex's business. Jim Sumpter obviously had intimate knowledge of Metroplex's business and, in fact, created the accounting method that guided Pat in commencing and continuing the operations. Norma went shopping with Pat each Saturday and they discussed Metroplex business with great regularity. Norma also participated in the accounting function in her role as Jim's assistant, including writing checks for FCC filing fees on Jim's business account. O.C. Brasher lived with Ron and

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[36] *Applications of Microwave Transfers to Teleprompter Approved with Warning*, 12 F.C.C. 2d 559 (1963), (Public Notice), (*i.e.* Intermountain Microwave Standard).

were being placed within the whole of the Metroplex system and it was understood that the channels would be used primarily to provide service to Metroplex customers and, secondarily, to provide service to mobile units mounted in the licensees' cars if they so desired. However, even a cursory review of the ways that revenue and fees passed through the family shows that what was good for Metroplex was good for all of the licensees. When Metroplex made money, it provided a salary to Carolyn Lutz, money to run the home O.C. lived in, and greater demand for accounting services from Jim. In other words, many hands washed each other for the combined and greater good of the family.

210. In light of the testimony provided by each witness, attesting to the close relationship of each of the family members and the way that each relied, either directly or indirectly, on the success or failure of Metroplex, the picture which becomes increasingly clear is that Metroplex was a family owned and operated business. In corporate parlance, Pat served as CEO. Jim was the Chief Financial Officer. Ron was Senior Vice President. Norma was assistant to the CFO, with Jennifer and Melissa sometimes serving in the family accounting department. Mr. Lewis was Vice President of Public Safety Accounts. David served as Chief Operations Officer. Diane was Corporate Secretary and Vice President of Finance. Carolyn Lutz was Assistant to the Vice President of Finance. And O.C. was of counsel. The licensees each served roles in the greater entity, the family. As testified, Metroplex did not have directors. This is consistent not with the operation of a typical, incorporated business, but with a family or joint venture.

211. Defendants aver that during all times relevant *de facto* control of the subject licenses was

held by the family and that such control never transferred, until such time as this matter fractured involuntarily the family unit. No other logical interpretation exists based on the totality of the evidence. Insofar as the primary operational concern used by the members of the family was Metroplex, one could also hold that Metroplex was always in control of the operations of the stations and that control was reflected on the face of each license. Yet, it was Ron and Pat that bought the repeaters and paid the site rentals. Metroplex paid rent to Ron and Pat. Yet again, both Metroplex and the elder Brashers went to Jim Sumpter for comprehensive financial advice and services, and those accounts served as the cornerstone of Jim Sumpter's accounting business for years. Again, the intertwining of family and business relations is so dense in practice that for one to try to define a single person or entity as the singular agent of operations, finance, installation, site rental, financial decision making, employment, and collective risk of operation is an impossible task. The facts are clear. This family owned the licenses. This family ran the business. This family risked the economic vagaries of the market. This family paid the bills and one another. And this family operated as a cohesive, well run organization of cooperating individuals until the Net Wave petition was served on each one. The defendants and the Sumpters did not cause a transfer of control, unauthorized or otherwise. An involuntary transfer of control occurred as a result of the fear attendant to the Net Wave petition. And that transfer of control did not affect the majority share of the family, but rather caused some of the "shareholders" to tender their interest to the other members.

212. To further illustrate that the licenses and stations and the business as a whole was a family enterprise or joint venture, one need only apply the indicia of control articulated in

Intermountain.

213. (1) Does the licensee have unfettered use of all facilities and equipment? Certainly, Ron and Pat did in their individual capacity as owners of the repeater equipment. Additionally, Metroplex and its employees could enter and use those facilities, including Mr. Lewis and Carolyn Lutz. Therefore, at least six of the family members fulfilled this test. And five held licenses in their own names at one time or another.

214. (2) Who controls daily operations? Pat works part time at Metroplex, whereas David is there every day, as was Carolyn Lutz. Testimony shows that Ron is down to about two days per week following retirement. Decisions about which bills to pay, when and how much to pay in taxes, was a joint decision of Jim Sumpter and Pat. Jim Sumpter advised Ron and Pat on the purchase of repeater equipment and oversaw all of the accounts. Other operational decisions were joint decisions of the family members in informal gatherings.

215. (3) Who determines policy decisions, including preparing and filing applications with the Commission? Although testimony shows that Ron did the yeoman's share of the licensing task, testimony further shows that Carolyn assisted in the effort, Pat and Carolyn wrote the filing fee checks, Norma participated in a number of licenses, Jim participated exclusively in financial transactions, including sale of licenses, and the remainder of the task was outsourced to John Black. Other policy decisions were the results of family get togethers where different combinations of family members discussed what steps to take next in any given area.

216. (4) Who is in charge of employment, supervision, and dismissal of personnel? Testimony

shows that such decisions were a joint consideration by Pat and Jim, with Pat having the final say. However, the record shows that no family member was ever discharged – thus, the family was unable to "fire" itself, a status equal to ownership.

217. (5) Who is in charge of payment of financial obligations, including expenses arising out of operations? Initial payment for equipment came from Ron and Pat's private account. Metroplex paid rents to Ron and Pat out of the company revenue. Payments for FCC filing fees came from both corporate and personal accounts of a number of the family members.

218. (6) Who receives monies and profits from the operations of the facilities? Each family member received money, either directly or indirectly, from the operations of the facilities. Such monies were in the form of wages, salaries, rents, benefits, radio equipment, radio service, and the value of accounting services to an increasingly profitable business.

219. The success or failure of the family business, including the use of the subject licenses, had a direct impact on the economic livelihood of the entire family and each of its members. Defendants recognize that Ron and Pat own the repeater equipment and the shares of stock in Metroplex. But it would be overstatement to say that together, Ron and Pat, made all of the operational and financial decisions regarding the use of the licenses or were the only beneficiaries of operation. Were that true, Norma could not have caused the T-band channels licensed to her and Melissa to be turned off based on no more than a telephone call to Carolyn. Certainly, terminating that service was not in the best interests of Ron or Pat, leaving sunk investment in repeater equipment stranded.

220. Insofar as defendants' method of licensing the facilities for the purpose of conforming the

Commission's records to reflect this common control is necessary, defendants are fully willing to cause a formal assignment of the subject licenses to DLB Enterprises, Inc. Applications are pending before the Bureau to assist in this process. And, given the disastrous effects of the Net Wave petition and the attendant egregious harm to family cooperation, grant of such assignments are wholly appropriate. This family does not operate as it once did. Norma and Pat do not go shopping every week as they once did. Carolyn Lutz gives Ron a wide berth following her resignation from Metroplex. And Jennifer and Melissa have been instructed by counsel to avoid their aunt and uncle.

221. So, what was once a cohesive family unit, closely working together and living together, is now fractured and the licensing of the facilities should conform to that personal tragedy. The Sumpters have filed applications indicating their desire to have the licenses assigned from their names, and the Commission should grant those assignments. Because it is those applications that reflect the present status of control of the stations, following the personal maelstrom visited upon the family by the Net Wave petition and this proceeding.

Appropriate Remedies

222. The Hearing Designation Order suggests the issuance of a forfeiture or revocation or a finding that defendants lack the character qualifications to hold a Commission license. Simply stated, the Bureau is asking for that which is sometimes referred to as the "death penalty."[37] This severe form of punishment is rare in the history of communications law.

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[37] *See, In The Matter of Petition for Declaratory Ruling Concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Bands*, 16 FCC Rcd. 4882, para. 5 (2001), (Memorandum

Case law directs that the court should not lightly consider such a final and extreme measure unless the facts overwhelmingly support such a decision.[38] It is wholly clear that the un-controverted facts within this matter do not support the disqualification of the defendants.[39]

223. The Court's decision to not disqualify defendants would be consistent with recent case law. In the summary decision issued in *In re Family Broadcasting, Inc.*,[40] that court found that the licensee had admitted to engaging in dozens of misrepresentations, fraudulent statements, abuse of the Commission's processes, etc., including failures to respond to Commission inquiries and to answer truthfully multiple requests for information; which finding resulted in a revocation of license and a disqualifying of the licensee. But what is of further significance is that the licensee was given a second

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Opinion and Order) where the Commission refers to reply comments of an interested party stating "that license revocation is the 'Death Penalty' of the industry and should not be considered or undertaken lightly".

[38] *See, FCC v. WOKO*, 329 U.S. 223 (1946) where the Communications Act does not require the imposition of the ultimate sanction of revocation in every case of a willful violation of a rule; *see, also, Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978) and *Humboldt Bay Video*, where it was found that Congress left to the Commission the discretion in each particular case to decide appropriate sanctions, weighing the nature of the violations and surrounding circumstances to determine whether the ultimate sanction of revocation should be invoked.

[39] Even when the Commission found that Qwest Communications International, Inc. engaged in hundreds of instances of fraud upon consumers and unlawful acts of slamming, the Commission proposed a forfeiture and did not assign a character qualification issue to the proceeding. *FCC Proposes $2 Million Fine For Long Distance Phone Provider Qwest Communications For Slamming, News Release* (released October 19, 1999).

[40] *See Family Broadcasting II.*

chance.[41] This matter was the second enforcement action taken against the licensee and that licensee had broken specific promises given in the first enforcement matter to the Commission to act in accord with its rules.[42] *Family Broadcasting* is also significant in that the Court held that "the impact of the violations were not sufficiently catastrophic in their consequences to warrant a forfeiture."[43] *Id* at para. 48. In this matter, the Bureau has not shown that any adverse consequences arose out of any action taken by defendants, except those adverse effects on defendants themselves.

224. Acting *pro se*, defendants engaged in a series of acts which were designed to obtain that spectrum necessary to operate their growing business to provide radio services to the public. Defendants relied on the questionable advice provided by a consultant and PCIA. Defendants then relied on their close family relations to file applications in the names of others in a manner which they believed was consistent with the Commission's rules and policies and in accord with the accounting system devised by Jim Sumpter. Defendants

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[41] Another recent instance in which the Commission has given a second chance occurred where the FCC proposed a fine of $140,000.00 against Peninsula Communications, Inc. The Commission found that Peninsula apparently failed to comply with an order to cease translator operations in various communities in Alaska. By failing to cease operations, Peninsula violated statutory requirements that transmissions of radio energy can lawfully only be performed with a FCC license. The Commission found that these violations were intentional, which caused the Commission to adjust the penalty by merely increasing the proposed fine. *Federal Communications Commission Proposes $140,000.00 Fine Against Peninsula Communications, Inc. for Failure to cease Translator Operations*, News Release, August 29, 2001, Action by the Commission, August 23, 2001, by Notice of Apparent Liability for Forfeiture and Order (FCC 01-242), Chairman Powell, Commissioners Tristani, Abernathy, Copps and Martin, File No. EB-01-IH-0403.

[42] *Family Broadcasting II*, at para. 44.

[43] *Id.* at para. 48; *citing*, *Oil Shale Broadcasting Co. (KWSR)*, 68 FCC 2d 517, 528-529 (1978).

relied on Ron's status as executor of O.C. Brasher's estate and as holder of that durable power of attorney in forwarding a replacement application in O.C.'s name. And although the record is clear that Ron also had prepared an application in the name of his late mother for the purpose of assisting another member of the family, the record also shows that Ron took affirmative steps to quash that application to assure that it never reached the Commission. Although this one incident demonstrates a woeful lack of judgement, the intervening effort to provide a remedy prior to the causing of any effect on the Commission's processes demonstrates an, albeit belated, fidelity to the Commission's rules.

225. As shown above, defendants' actions and the documentary record do not support a finding of misrepresentation or lack of candor. To the contrary, each of the subject licenses clearly showed Metroplex as the control point; there was no effort to conceal the Brasher family name on the applications; Ron Brasher was listed as preparer on earlier applications; and most of the checks for filing and coordination fees came from the Brasher account.[44] Nor have the defendants ever denied the family connection among the licenses. If the court finds that the actions taken are not in conformity with the Commission's rules, then that lack of conformity was unknown to defendants at the time

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[44] *See, James A. Kay, Jr.*, at para. 205 where it was found that the Bureau offered no evidence showing that Kay in any way acted to conceal his involvement in the applications. Much like the facts regarding Ron Brasher and the license applications in question, in many instances Kay's name and telephone number was provided in the applications as the contact person and the one who prepared the application.

the actions were taken. Instead, the testimony demonstrates that defendants were unaware that violations of Commission rules were possible by their actions.

226. The allegation of forgery is simply unfounded and unproven. Nor has the Bureau shown any motivation for such action. The record clearly shows a close, cooperative family which together participated in the licensing and operation of radio facilities. There was no need to engage in forgery. And if applications were improperly signed by third parties, the identity of the signing party has not been established to be the defendants. In fact, the only expert testimony presented is that Ron was not the signer of the Sumpter T-band applications. Instead, the record is rife with evidence of ratification of each application by and through the licensees' independent acts involving the receipt of official correspondence, forwarding of mail, execution of notifications of construction, supportive letters, and participation in applications for assignment. Despite the testimony of ignorance or lack of memory by some of the licensees, which must be viewed in light of each Sumpters' fear of punishment, the expert witness testified that it is likely that Norma, Melissa and Jennifer signed their "client copies." The record thus points to each Sumpter's participation in the licensing of their subject stations and, by obvious inference, Jim's participation and knowledge since Jim was the recognized leader of the Sumpter branch of the family.

227. The allegation of abuse of the Commission's processes also lacks the necessary foundation in fact and law. As shown above, defendants were fully eligible in their own names to

obtain and hold each of the subject licenses.[45] Acting *pro se*, the defendants simply didn't know how to accomplish this feat. And out of that ignorance sprang the series of events which have left this family in tatters.

228. Defendants aver that no unauthorized transfer of control of the subject licenses occurred.[46] In view of the facts, defendants urge the Court to find that the family was and is in control of the facilities through a series of financial, contractual, and operational interworkings that were designed by Jim Sumpter and executed by the defendants.[47] Grant of those applications for assignment of some of the licenses may clarify, in a wholly administrative

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[45] *See, supra,* paragraphs 193-195, regarding defendants' eligibility to hold the licenses in question.

[46] A determination of whether a transfer of *de facto* control has occurred requires that the Commission consider the totality of the circumstances to ascertain where actual control resides. *Brian L. O'Neill*, at para. 25; *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975); *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982); and *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982) (hereinafter, "*Blue Ribbon Broadcasting*").

[47] Defendants respectfully note that a finding of unauthorized transfer of control is usually the basis for forfeiture, not revocation. *See e.g., In re Citicasters Co.*, DA 01-823 (released April 4, 2001); *Brian L. O'Neill; Salem Broadcasting, Inc.*, 6 FCC Rcd 4172, 4173 (1991); *In Re Applications of Roy M. Speer*, 11 FCC Rcd 6905 (1991); *First Broadcasting Corp.*, 3 FCC Rcd. 2758 (1988); *In The Matter of Liability of Cate Communications*, 60 RR 2d 1386, (1986); *Ms. Sally Hoskins*, 13 FCC Rcd 25,317 (1998); *see, also, Danville Television Partnership* where the Commission concluded that Danville willfully and repeatedly engaged in an unauthorized transfer of control in violation of 47 U.S.C. § 310(d) of the Communications Act of 1934. The Commission determined that the appropriate sanction for this violation was a monetary forfeiture; *In The Matters Of NORCOM Communications Corp.*, 15 FCC Rcd. 1826, para. 28 (1999) (Summary Decision of Admin. L. J., John Frysiak) "[h]owever, an unauthorized transfer of control, standing alone, is not a sufficiently egregious violation, under FCC precedent, to implicate disqualification of the entities involved."; *In Re Applications of Deer Lodge Broadcasting, Inc.*, 8 FCC 2d 1066, para. 66 (1981) where it was found that Commission precedents did not dictate that Deer Lodge must lose its license for the unauthorized transfer of control. The cases relied upon by the Commission for denial of licenses were found to be typical of a long line of cases where unauthorized transfers of control were accompanied by deliberate attempts to conceal the illegal transfer by misrepresentation and other deceptive activities.

manner, the identity of the entity which controls the licenses today, by consolidating the licenses under a different, still cooperative unit of the family. But the facts demonstrate that the family, as a single, formerly cohesive unit, was the entity which always controlled the licenses in the past.

229. The death penalty and revocation are punishments reserved for the most egregious violations of law.[48] Such punishment is exacted only when clear evidence demonstrates that a person cannot be trusted to hold a Commission license because that person has committed repeated and egregious acts of fraud, misrepresentation, felonious acts, and a consistent disregard for the authority of the Commission and the importance of adhering to the rules promulgated by the agency.[49] The facts in this case do not support a finding of such behavior and such punishment would be inappropriate.[50]

230. Further, the use of the death penalty is to be reflective of the conduct which the court believes is most likely to occur in the future.[51] In this case, all questionable acts engaged in by defendants are many years old during a time when defendants acted *pro se*. Since

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[48] The agency has held that when parties make their actions known to the Commission and no culpable non-disclosure or concealment appear on the record, then the severe sanction of revocation of a license is not warranted. *Blue Ribbon Broadcasting*, at para. 9. *Compare, Marc Sobel*, where Sobel's conduct was deemed egregious in that it was "willful, repeated and continued throughout the hearing"; *see, also, IBD Communications Group*, 10 FCC Rcd. 1110, n. 42 (1994) "[i]n general unauthorized transfers of control lead the Commission to consider license revocation only when the violation is concealed through misrepresentation or other deception."

[49] *See, Fox River Broadcasting, RKO, Marc Sobel, and Otis Hale.*

[50] *See, In re Weigel Broadcasting Co.*, 2 FCC Rcd. 1206 (1987) "The absence of any affirmative evidence of an intent to deceive forecloses the need for a license revocation hearing."

[51] *See, Character Policy I; Marc Sobel.*

that time, defendants have retained communications counsel and have come to understand that future regulatory matters should and must be reviewed and directed by that counsel to assure fidelity to the Commission's rules and policies. Now in retirement, Ron Brasher, appreciates that despite his status as executor of an estate or holder of a durable power of attorney, procedural rules regarding the handling of estate matters before the Commission are subject to not only his impression of probate law, but also subject to the codified duties to comply fully with the dictates of Commission rules and decisions.[52]

231. During the pendency of the investigation and the subsequent hearing, defendants were forthright in their participation and cooperation. No requested documents were withheld. All questions were answered, even when the questions were personal or the answers embarrassing. Sensitive financial information was freely provided. And no objection was lodged to any Bureau request.[53] Instead, the investigation included a peering into the good, but sometimes muddled, and the bad, but formerly cooperative, intra-family relationships among the parties and the witnesses. Significantly, the Court may note that excepting the report of the expert witness and the few pages of John Black's personal

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[52] *Compare, In the Matter of Chameleon Radio Corporation*, FCC 97D-11, 12 FCC Rcd 19348, para. 38 (1997) where the Commission concluded that Chameleon was unfit to be a Commission licensee because the Commission found that there was nothing to indicate that Chameleon either understands or can be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with its rules and policies.

[53] *See, In The Matter of Application of Nomar Vizcarrondo*, 65 RR 2d 1712, 4 FCC Rcd. 1432 (1989) where the amateur radio station licenses of several persons were revoked for various violations of the rules, finding that the willful nature of those violations made revocation the proper sanction, and that no mitigating circumstances existed. However, three of the licensees were found to have been cooperative in the Commission's investigation and this cooperation was a mitigating factor warranting a finding that those cooperative licensees would not be permanently disqualified.

correspondence, the hundreds of pages of exhibits employed by the Bureau were all supplied by the defendants.[54]

232. What is abundantly clear is that the Net Wave petition ruined this family. The Sumpters each testified to their individual fears about jail, fines, loss of professional licenses, and a host of other imagined outcomes to their personal involvement in this matter. The Sumpters' shared fears were borne of the irresponsibly strident language contained in the Net Wave petition which employed invective regarding the family's efforts saying that the licensees had been "false and misleading" and that the family's action "constitutes a fraud," is "unlawful," is an "illegal paper licensing game" and a "licensing scam," or a "crude frequency grab." Further, Net Wave said the Sumpters were involved in a "blatantly illegal plan ...all in flagrant contempt of the public interest." The purple prose contained in the Net Wave petition sent a shock wave through this family, the effects of which are still being felt today.

233. A trusted accountant/brother in law, withdrew services. A sister resigned her position at Metroplex. Nieces were directed to file unflattering affidavits with the Bureau, designed to protect the Sumpters at the expense of their aunt and uncle's reputation and livelihood. Counsel directed the Sumpters to cease their formerly close association with the Brashers, and the schism continues to effect both holidays and the simple pleasant ritual of two sisters' going shopping together on Saturdays. Trust has been replaced with distrust and

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[54] Conspicuously missing was any document supplied by the Sumpters, despite one's reasonable expectation that an accounting firm would maintain records of such claimed occurrences as, say, the repayment of filing fees by defendants.

fear. This matter has created a chasm between them all and has plunged the lives of the licensees into uncertainty and fear of economic ruin.

234. And where is Net Wave? Its damage done, it has moved on over the horizon, no doubt pleased with the unexpected and unearned results of its competitively motivated petition. It did not participate in trial. The principals of Net Wave have not had their families torn apart. No witness from Net Wave appeared at trial or appeared to give a deposition or was inconvenienced or bore the cost of participation. In fact, the record shows that Net Wave was never injured by the acts of which its petition complained. At the time the petition was filed there was ample T-band (and other) channels ripe for licensing by Net Wave for the purpose of any operation it chose. This fact begs the question of whom is the victim in this matter?

235. The Commission was not injured. Its processes do not preclude the existence of managed facilities and its intention in the creation of Section 90.313 has been fully served. The public has enjoyed the use of the radio systems in providing service to hundreds of radio units. Metroplex provides radio sales, service and maintenance to both public and private sector customers who have presumably benefitted by the family's investment and diligence in those operations. No allegation of spectrum warehousing stands. To the contrary, the facts demonstrate that the licensing resulted in full loading of the subject channels. And the Commission's encouragement of deployment of new and flexible technology has simultaneously been served by defendants' willingness to launch a new mobile data system, previously unknown in the Dallas area. In sum, the actions taken by defendants were in complete conformity with both the spirit and the intention of the Commission's

rules for use of T-band facilities and did not result in injury or harm to Net Wave, the Commission, the public interest, or any person, thus a forfeiture is not necessary or warranted, *see, Family Broadcasting*.

236. These defendants have suffered a long and arduous and painstaking investigation which results demonstrate a theme of unsophisticated, ignorant, and ambitious actions taken by persons acting *pro se* who thought that they had found a convenient loophole to duplicate in Allen their licensing efforts in having granted WIL990 in Dallas. The attorneys fees, travel costs, duplication costs, and the costs to their reputation have been quite daunting. The uncertainty to their family business has been quite devastating, resulting in numerous loss opportunities. But the worse effect of the investigation and the hearing has been the loss of family. Defendants aver that a decision to revoke their licenses or disqualify the defendants will insure that the loss will be tragically permanent. Simple fairness and compassion dictate a different outcome.

Conclusion

237. For the reasons stated above and for good cause shown, defendants respectfully request that the Court find that the allegations contained within the Hearing Designation Order have not been supported by the facts of record; that the Bureau has not satisfied its burden of proof as to any specific allegation; that the applications for assignment be granted; that no licenses be revoked; and that defendants have the character qualifications to remain Commission licensees. In the event that the Court finds that wrongful acts have occurred, defendants respectfully request that no forfeiture be applied since no harm has occurred as

a result of defendants' actions, which occurred without specific intent to deceive the Commission.

Respectfully submitted,

RONALD D. BRASHER
PATRICIA A. BRASHER
DLB ENTERPRISES, INC. d/b/a
METROPLEX TWO-WAY

By _____
Michael L. Higgs, Jr.

By _____
Robert H. Schwaninger, Jr.

Dated: September 14, 2001

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CERTIFICATE OF SERVICE

I, Susan Vernal, hereby certify that the original and copies of the foregoing Proposed Findings of Fact and Conclusions of Law in Case No. 00-156 was served by hand delivery and/or UPS Express Delivery upon the below listed parties on this 14th day of September, 2001.

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